

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS**

<p>IN RE PHARMACEUTICAL INDUSTRY AVERAGE WHOLESALE PRICE LITIGATION</p>	<p>MDL NO. 1456 Civil Action No. 01-12257-PBS Judge Patti B. Saris</p>
<p>THIS DOCUMENT RELATES TO:</p> <p><i>The City of New York v. Abbott Laboratories, Inc., et al.</i> S.D.N.Y. Case No. 04-CV-06054</p> <p><i>County of Albany v. Abbott Laboratories, Inc., et al.</i> N.D.N.Y. Case No. 05-CV-0425</p> <p><i>County of Allegany v. Abbott Laboratories, Inc., et al.</i> W.D.N.Y. Case No. 05-CV-0236</p> <p><i>County of Broome v. Abbott Laboratories, Inc., et al.</i> N.D.N.Y. Case No. 05-CV-0456</p> <p><i>County of Cattaraugus v. Abbott Laboratories, Inc., et al.</i> W.D.N.Y. Case No. 05-CV-0256</p> <p><i>County of Cayuga v. Abbott Laboratories, Inc., et al.</i> N.D.N.Y. Case No. 05-CV-0423</p> <p><i>County of Chautauqua v. Abbott Laboratories, Inc., et al.</i> W.D.N.Y. Case No. 05-CV-0214</p> <p><i>County of Chemung v. Abbott Laboratories, Inc., et al.</i> W.D.N.Y. Case No. 05-CV-6744</p> <p><i>County of Chenango v. Abbott Laboratories, Inc., et al.</i> N.D.N.Y. Case No. 05-CV-0354</p> <p><i>County of Columbia v. Abbott Laboratories, Inc., et al.</i> N.D.N.Y. Case No. 05-CV-0867</p> <p><i>County of Cortland v. Abbott Laboratories, Inc., et al.</i> N.D.N.Y. Case No. 05-CV-0881</p> <p><i>County of Dutchess v. Abbott Laboratories, Inc., et al.</i> S.D.N.Y. Case No. 05-CV-6458</p> <p><i>County of Essex v. Abbott Laboratories, Inc., et al.</i> N.D.N.Y. Case No. 05-CV-0878</p> <p><i>County of Fulton v. Abbott Laboratories, Inc., et al.</i> N.D.N.Y. Case No. 05-CV-0519</p>	<p>PLAINTIFFS' JOINT SURREPLY IN FURTHER OPPOSITION TO DEFENDANT ELI LILLY AND COMPANY'S INDIVIDUAL MOTION TO DISMISS</p>

County of Genesee v. Abbott Laboratories, Inc., et al.
W.D.N.Y. Case No. 05-CV-00267

County of Greene v. Abbott Laboratories, Inc., et al.
N.D.N.Y. Case No. 05-CV-0474

County of Herkimer v. Abbott Laboratories, Inc., et al.
N.D.N.Y. Case No. 05-CV-00415

County of Jefferson v. Abbott Laboratories, Inc., et al.
N.D.N.Y. Case No. 05-CV-0715

County of Lewis v. Abbott Laboratories, Inc., et al.
N.D.N.Y. Case No. 05-CV-0839

County of Madison v. Abbott Laboratories, Inc., et al.
N.D.N.Y. Case No. 05-CV-00714

County of Monroe v. Abbott Laboratories, Inc., et al.
W.D.N.Y. Case No. 05-CV-6148

County of Nassau v. Abbott Laboratories, Inc., et al.
E.D.N.Y. Case No. 04-CV-05126

County of Niagara v. Abbott Laboratories, Inc., et al.
W.D.N.Y. Case No. 05-CV-06296

County of Oneida v. Abbott Laboratories, Inc., et al.
N.D.N.Y. Case No. 05-CV-0489

County of Onondaga v. Abbott Laboratories, Inc., et al.
N.D.N.Y. Case No. 05-CV-0088

County of Ontario v. Abbott Laboratories, Inc., et al.
W.D.N.Y. Case No. 05-CV-6373

County of Orleans v. Abbott Laboratories, Inc., et al.
W.D.N.Y. Case No. 05-CV-6371

County of Putnam v. Abbott Laboratories, Inc., et al.
S.D.N.Y. Case No. 05-CV-04740

County of Rensselaer v. Abbott Laboratories, Inc., et al.
N.D.N.Y. Case No. 05-CV-00422

County of Rockland v. Abbott Laboratories, Inc., et al.
S.D.N.Y. Case No. 03-CV-7055

County of Schuyler v. Abbott Laboratories, Inc., et al.
W.D.N.Y. Case No. 05-CV-6387

County of Seneca v. Abbott Laboratories, Inc., et al.

W.D.N.Y. Case No. 05-CV-6370

County of St. Lawrence v. Abbott Laboratories, Inc., et al.
N.D.N.Y. Case No. 05-CV-0479

County of Saratoga v. Abbott Laboratories, Inc., et al.
N.D.N.Y. Case No. 05-CV-0478

County of Steuben v. Abbott Laboratories, Inc., et al.
W.D.N.Y. Case No. 05-CV-6223

County of Suffolk v. Abbott Laboratories, Inc., et al.
E.D.N.Y. Case No. 03-CV-12257

County of Tompkins v. Abbott Laboratories, Inc., et al.
N.D.N.Y. Case No. 05-CV-0397

County of Ulster v. Abbott Laboratories, Inc., et al.
N.D.N.Y. Case No. 06-CV-0123

County of Warren v. Abbott Laboratories, Inc., et al.
N.D.N.Y. Case No. 05-CV-0468

County of Washington v. Abbott Laboratories, Inc., et al.
N.D.N.Y. Case No. 05-CV-0408

County of Wayne v. Abbott Laboratories, Inc., et al.
W.D.N.Y. Case No. 05-CV-06138

County of Westchester v. Abbott Laboratories, Inc., et al.
S.D.N.Y. Case No. 03-CV-6178

County of Wyoming v. Abbott Laboratories, Inc., et al.
W.D.N.Y. Case No. 05-CV-6379

County of Yates v. Abbott Laboratories, Inc., et al.
W.D.N.Y. Case No. 05-CV-06172

INTRODUCTION

Eli Lilly and Company (“Lilly”) in both the Lilly MTD¹ and its individual reply memorandum (“Lilly Reply”) does not challenge a single paragraph in plaintiffs’ complaints as insufficient. Instead, as the primary grounds for seeking dismissal of all claims, Lilly contends that plaintiffs’ claims should be dismissed because they are seeking a “do over” of the Court’s previous ruling in *Suffolk*² and there is nothing new and different from the complaint in *Suffolk*. Lilly further contends that all claims against it were dismissed in *Suffolk* as evidenced by the fact that it was not required to (and did not) file an answer in *Suffolk* and that *Suffolk* did not bring any causes of actions against Lilly in the Consolidated Complaint.

Lilly is flat out wrong. Plaintiffs’ allegations provide substantially more specificity and detail than the allegations in *Suffolk*. Here, the plaintiffs have identified fraudulent AWPs for all Lilly drugs for which they seek relief and properly used conservative and generally available wholesale prices as proxies for what accurate Lilly AWP should have been.³ Plaintiffs also allege sufficient grounds to support its Best Price claims, including ongoing government investigations into Lilly’s pricing practices that are directly relevant to and support plaintiffs’ claims of Best Price and AWP fraud. As plaintiffs showed decisively in their individual opposition memorandum, the specificity of these allegations satisfies the particularity requirements of Fed. Rule Civ. P. 9(b) as well as this

¹For clarity and consistency, plaintiffs use the same definitions of all terms and cases cited in their corresponding individual opposition memorandum (“Lilly Opp.”). Additionally, all other causes not addressed herein are addressed in Plaintiffs Consolidated Sur-Reply to Defendants Motion to Dismiss, filed contemporaneously herewith (referred to herein as “Consolidated Sur-Reply.”)

² See *In re Pharm. Indus. Average Wholesale Price Litig.* 339 F.Supp.2d 165 (“*Suffolk I*”); *In re Pharm. Indus. Average Wholesale Price Litig.*, 2004 WL 2387125 (D. Mass., Oct. 26, 2004) (“*Suffolk II*”); *In re Pharm. Indus. Average Wholesale Price Litig.* Memorandum and Order (D. Mass. April 8, 2005)(“*Suffolk III*”).

³See CC at ¶¶434-448, Exh. A & B; NSAC at ¶¶ 372-384, Exh. B.

Court's prior rulings, including those in *Suffolk*. Lastly, the Court did not dismiss any non-fraud based state claims against Lilly in *Suffolk*. Lilly's motion to dismiss should be denied in its entirety.

DISCUSSION

As illustrated in great detail in their opposition to the Lilly MTD ("Lilly Opp"), plaintiffs plead facts in support of their Best Price and fraudulent AWP claims with sufficient specificity to meet the requirements of Fed. R. Civ. P. 9(b) as well as this Court's prior rulings in *Suffolk*. *See* MTD Opp at 1. Plaintiffs' showing stands and is not disturbed in the least by the Lilly Reply, to wit:

First, Lilly does not challenge the sufficiency of a single paragraph of plaintiffs' complaints in its individual motion to dismiss or its individual reply. Its sole grounds for dismissal are the rulings in *Suffolk*.

Second, Lilly's contention that there is nothing new or different in the plaintiffs' complaints from those in *Suffolk* is demonstrably wrong. As shown in Exhibit A to plaintiffs' Consolidated Opposition, the Lilly allegations at issue here are markedly different from those in *Suffolk*, including but not limited to:

- * Specific allegations that Lilly negotiated prices with its providers, PBMs, GPOs and other large purchasers at deep discounts off WAC, while at the same time maintaining false AWPs (*see* CC ¶437; NSAC ¶ 375);
- * Fraudulent AWPs compared with **actual prices** (based on House Committee documents) in 2001 for Vancocin 10mg showing spreads as high as 239% (*see* CC ¶439; NSAC ¶ 379);
- * Fraudulent AWP compared with **actual available market price** in 2000 for Humalog Mix 75/25 vial showing spreads as high as 612% (*see* CC ¶440);
- * Specific deep discounts in 2004 Zyprexa and Symbax not accounted for in calculations of WAC or AWP (*see* CC ¶¶ 442-443; NSAC ¶¶ 382-384);

- Fraudulent AWPs for 116 NDCs in 2000 (*see* CC Exh. A; NSAC Exh. B).

None of the above allegations or AWP proxies were in the Suffolk complaint. Lilly has not challenged the sufficiency of any of these particular allegations here.

Third, the Court did not dismiss all claims against Lilly in Suffolk. As plaintiffs point out in its Consolidated Opposition and its individual opposition to the Lilly MTD, the Court sustained Suffolk's AWP-based and Best Price-based unjust enrichment claims and claims for violation of 18 N.Y.C.R.R. §515(b)(4) & (5) and NY Soc. Sec. Law §367-a(7)(d) against the Suffolk 13 +6, which includes Lilly. Thus, at the very least, these claims survive in *Suffolk*. Furthermore, Lilly did not dispute any non-fraud related claims in the Lilly MTD.

Fourth, the fact that Lilly is not required to (and has not) filed an answer in *Suffolk* is utterly irrelevant. No defendant in *Suffolk* is required to file an answer to the Suffolk Complaint at this point and no defendant has filed an answer. At the hearing on April 8, 2005, the Court specifically stayed any answers in *Suffolk* pending the outcome of the motions to dismiss here.

Fifth, the fact that Suffolk did not bring any claims against Lilly as part of the Consolidated Complaint is again utterly irrelevant. Footnote 17 of the Consolidated Opposition makes clear that Suffolk has joined in the Consolidated Complaint only as to those defendants not named in Suffolk's prior complaint. Judicial economy and the Court's rulings on April 8, 2005 require that any Suffolk initiative to join in the Consolidated Complaint as against all defendants should await the Court's rulings on the instant motions.

CONCLUSION

For the reasons set forth herein and in Plaintiffs' Opposition memorandum, Lilly's individual Motion to Dismiss should be denied in its entirety.

Dated: June 2, 2006.

Respectfully submitted,

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except Nassau, by**

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